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Supreme Court, U.S.
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No. 98-1772

In The

Supreme Court of the United States

JEHAN ZEB MIR, MD,

Petitioner,

v.

FHP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

JEHAN ZEB MIR, MD
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Petitioner Pro Se

3288

TABLE OF CONTENTS

Page

Objections to Respondent's Statement of the Case.. 1

The Respondent offers Contradictory Arguments That Ninth Circuit Court Procedurally Processed Mir's Request for Hearing on a Rule 60(b) Motion Substantially Similar to Other Circuit Courts And That District Court Could Not Grant a Rule 60(b) Motion Pending Appeal And Absent Appellate Remand..... 3

Respondent Waived Right To Contest A Frivolous Unpreserved Issue..... 8

Petitioner Presents Additional Jurisdictional Question For Grant of Certiorari 9

Conclusions 10

TABLE OF APPENDICES

Page

Appendix H Plaintiff's Reply to Defendant's Opposition To Motion To Grant Hearing On Rule 60(b) Motion Dated May 5, 1997.....App. 1

Appendix I Declaration of Jehan Zeb Mir, MD In Support of Motion To Grant Hearing on Rule 60 Motion Dated April 18, 1997 .....App. 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aldridge Enterprises, Inc. v. United States, 938 F.2d 1134 (10th Cir. 1991) 4

Brown v. United States, 976 F.2d 1104 (7th Cir. 1992) 4

Commonwealth of Puerto Rico v. SS Colocotrani, 601 F.2d 39 (1st Cir.) 3

First National Bank Of Salem v. Hirsch, 535 F.2d 343 (6th Cir. 1976) 4

Hoai v. Vo, 935 F.2d 308 (D.C. Cir. 1991) 5

Meadow v. Employer Health Insurance, 47 F.3d 1006 (9th Cir. 1995) 6

Pioneer Ins. Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977) 4

Ryan v. United States Line Co., 303 F.2d 47 (2nd Cir. 1992) 3

Simon v. Gorsuch, 715 F.2d 1248 (7th Cir. 1983) 4

Stein v. Wood, 127 F.3d 1187 (9th Cir. Niv. 1997) 7

Toliver v. County of Sullivan, 957 F.2d 47 (2nd Cir. 1992) 3

Townsend v. Holmes Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) 6

Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994) 4

United States v. Accounts Nos. 303450454 & 144-07143, 971 F.2d 974 (3d Cir. 1992) 3

In Re: Wolf, 842 F.2d 464 (D.C. Cir. 1988) 9

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES SUPREME COURT CASES

Izumi Seimitsu Kogyo Ksbushiki Kaisha v. United States Philip Corp., 126 L. Ed. 2d 396, 62 USLW 4007, 1993-2 CCH Trade Cases # 70428, 7 FLW Fed S. 661 (1993 U.S.) 9, 10

Mishkin v. New York, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, *reh. den.*, 384 U.S. 934, 16 L. Ed. 2d 535, 86 S Ct. 1440 (1966) 8

Stone v. I.N.S., 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) 7, 8, 9

Tyrrell v. District of Columbia, 243 U.S. 1, 61 L. Ed. 557, 37 S. Ct. 361 (1917) 8

RULES

Federal Rules of Civil Procedure 41(a)(1)(ii) 9

Federal Rules of Civil Procedure Rule 60(b) ..... *passim*

Local District Court Rule 2.10 2

OTHER AUTHORITIES

Moore's Federal Practice, 60.67[2][c] 60-209-210 (Mathew Bender, 3rd Edition) 3, 5

Wright & Miller, Federal Practice & Procedure 8, 9

OBJECTIONS TO RESPONDENT'S STATEMENT OF THE CASE

Relevant misstated facts are as follows:

The emergency surgical fees were not denied because the fees were unreasonable and excessive. FHP, Inc. fraudulently denied the entire amount of the claim on the sole grounds that the surgery was allegedly performed on a dead patient.

FHP, Inc. had defrauded the Petitioner on other occasions. Simultaneously, according to the Los Angeles Times, FHP, Inc. was indicted by the Department of Justice on more than one hundred counts of defrauding Medicare.

Respondent has described the Petitioner as a "hard headed individual" because Petitioner would not submit to its bogus Counter Claim and excessively billed Claim for attorney fees. Petitioner proved to the Court of Appeals that attorneys for the Respondent in their billings records had charged for legal services which were never rendered.

For example, attorney Moore charged $387.50 for travel to and from Los Angeles for hearing on Rule 60(b) motion; prepare Notice of Ruling, while the evidence on the record showed that Judge Davies took the matter under submission on May 8, 1997, denied the motion on the same day, prepared and issued order. Petitioner will have to pay for this bill, if the judgment is allowed to stand.

It's a matter of common observation that in a street quarrel, the person with a poor or no argument is usually more abusive.

MIR never knew about any of the proceedings in the District Court till he was served with the Order for Judgment for Attorney's Fees. (Appendix I)

Respondent's attorneys secretively notified the District Court that the case had been settled. After receiving Order for Judgment, Petitioner could not contact his attorney and on March 4, 1997, had to review his district court file and discovered a letter from FHP, Inc. attorney James Jackson to Judge Davies, dated March 20, 1995, informing him that the case had been settled.

On March 11, 1997 the Petitioner returned to district court to make copies and found that the March 20, 1997 letter was missing and there were some loose pages in the file. The file was intact when it was returned to the Court Clerk on March 4, 1997.

Petitioner immediately contacted the Respondent's attorney by phone and by letter to demand a copy of the letter. FHP, Inc. attorney Joey Moore wrote that he did not have March 20, 1995 letter, even though in his declaration in support of Summary Judgment Motion, he had testified that on March 20, 1995, the District Court was informed of the settlement. This direct personal communication was in violation of Local Court Rule, 2.10, which prohibits communications with the judge by letter or person in the absence of the opposing party.

If MIR had breached the oral agreement, the Respondent's attorneys should have moved the District Court in March 1995, to enforce the breach of the Oral Agreement. They did not, instead they had the case secretively dismissed.

THE RESPONDENT OFFERS CONTRADICTORY ARGUMENTS THAT NINTH CIRCUIT COURT PROCEDURALLY PROCESSED MIR'S REQUEST FOR HEARING ON A RULE 60(b) MOTION SUBSTANTIALLY SIMILAR TO OTHER CIRCUIT COURTS AND THAT DISTRICT COURT COULD NOT GRANT A RULE 60(b) MOTION PENDING APPEAL AND ABSENT APPELLATE REMAND

The procedures employed in the other Circuit Courts grant an unrestricted right of the movant for relief under Rule 60(b) after Notice of Appeal is filed as follows (Moore's Federal Practice, 60.67[2][c] (Mathew Bender, 3rd Edition)):

1st Circuit "When an appeal is pending . . . , parties may file a Rule 60(b) motion directly in the district court without seeking prior leave from us. The district court is directed to review such motions expeditiously. *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979).

2d Circuit "For proposition that 'district court can entertain and deny the rule 60(b) motion; however,' if [district court] decides in favor of it, then and only then is the necessary remand by the court of appeals to be sought" *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992); (citing *Ryan v. United States Line Co.*, 303 F.2d 430, 434 (2d Cir. 1962)

3d Circuit "The filing of a notice of appeal does not divest a district court of jurisdiction to entertain Rule 60(b) motion" *United States v. Accounts No. 3034504504 & 144-07143*, 971 F.2d 974, 988 (3d Cir. 1992).

5th Circuit "Our court recognizes. . . . " the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeal. . . . When the district court is inclined to grant the Rule 60(b) motion, however, then it is necessary to obtain the leave of the court of

appeals. "*Traveler's Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994).

6th Circuit "The party seeking to file a Rule 60(b) motion . . . should have filed that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First National Bank of Salem v. Hirsch*, 535 F.2d 343, 346 & n.2 (6th Cir. 1976).

7th Circuit "Parties may file motions under Rule 60(b) in the district court while an appeal is pending. In such circumstances we have directed district courts to review such motions promptly, and either that we may order a speedy remand. "*Brown v. United States*, 976 F.2d 1104, 1110-1111 (7th Cir. 1992).

7th Circuit "A district court has jurisdiction to consider and deny Rule 60(b) motions during the pendency of an appeal" *Simon v. Gorsuch*, 715 F.2d 1248, 1252 (7th Cir. 1983).

8th Circuit "During the pendency of an appeal . . . the district court has jurisdiction to consider the motion and if it finds the motion to be without merit to enter an order denying the motion, from which an appeal may be taken. If on the other hand, the district court decides that the motion should be granted, the counsel for the movant should request the court of appeal to remand." *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977).

10th Circuit "Although it lacked jurisdiction to grant the Rule 60(b) motion due to the appeal . . . , the court was free to consider and the court could then either deny upon *merits* or the court could have notified us of its intention to grant the motion upon proper remand." *Aldrich Enterprises, Inc. v. United States*, 938 F.2d 1134 (10th Cir. 1991).

D.C. Circuit "When both a Rule 60(b) motion and an appeal are pending simultaneously . . . the District Court may consider the Rule 60(b) motion and, if the District

Court indicates that it will grant relief, the appellant may move the appellate court for a remand." *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991).

It is clear from the foregoing that even though there is slight disagreement within the circuits whether or not the district court has jurisdiction pending appeal, all of the Circuit Courts provide that the district court could freely grant a Rule 60(b) motion during pendency of appeal.

The issue of remand is totally irrelevant in these Circuit Courts for consideration of Rule 60(b) motion. If the district court does not grant a Rule 60(b) motion, the appeal process can continue on the rest of the issues without the unnecessary step of remand.

The Respondent erroneously argues that Ninth Circuit Court's procedure is substantially similar to that used by other Circuits when it requires that *District Court has no jurisdiction to rule on Rule 60(b) motion unless an appellate remand is first obtained.* In order to obtain an appellate remand one must first just *"ask"* the district court whether it wishes to entertain a Rule 60(b) motion. A procedure Petitioner closely followed and the District Court ruled that it had no jurisdiction to even rule on that.

The dissimilarities in the procedure for obtaining a Rule 60(b) just don't end here. "Ninth circuit court continues to insist that appellate court must remand before district court may entertain Rule 60(b) Motion." "However, the Ninth Circuit is sufficiently adamant about its *unique* procedure that it has upheld sanctions against a litigant who did not "ask" but simply made a Rule 60(b) motion directly in the district court after filing a notice of appeal." Moore's Federal Practice, 60.67[2][c], 60-209-210 (Mathew Bender, 3rd Edition).

"A competent reading of our rules and precedent would very quickly have made clear to Wright that he did

not follow the correct procedure in attempting to have the sanction motion reconsider after he had filed his notice of appeal." *Townsend v. Holmes Consulting Corp.*, 929 F.2d 1358, 1366-1367 (9th Cir. 1990).

Contrary to Respondent's assertion, the District Court cannot possibly be expected to rule on *merits* of Rule 60(b) motion unless a formal Rule 60(b) motion with genuine issues of material facts is placed before the District Court for requesting Relief from Default Summary Judgment.

Petitioner stated "Excusable Neglect" due to attorney's negligence; Fraud, misrepresentation, circumvention; newly discovered evidence and Lack of jurisdiction as grounds for relief.

The Respondent had conceded before the District Court that MIR's attorney had committed malpractice. Punishing client for the sins of his attorney does not make sense. Even if the client may have cause of action for malpractice, the client still loses by expending time, energy and money in litigation and emotional turmoil. The attorney fees in a malpractice action are not recoverable. Subjecting client into another legal action also does not best serve the interest of judicial economy. (Appendix H, I)

The lack of jurisdiction was based upon two grounds – (1) District Court awarding attorney's fees after altering the *undisputed* stipulated terms and conditions of the oral agreement by attaching on its own the terms of *"fundamental contract principle"* (Appendix F-18) (2) Third party's independent state law claims of misrepresentation were not pre-empted by ERISA pursuant to *Meadow v. Employer Health Insurance*, 47 F.3d 1006 (9th Cir. 1995).

The District Court ruling that *"No grounds* are stated that would justify the extraordinary relief" is simply not supported by the evidence on the record. (Appendix H – App. 10).

It's apparent that the district court did not review the pleadings. Why would the district court review merits of the motion when the Court felt at the outset that Court had "no jurisdiction over the case"? (Appendix E-2).

On appeal, the Ninth Circuit Court did not find that Petitioner had not stated grounds that would justify relief; instead it found district court lacked jurisdiction. (Appendix A-6). Expressing willingness to "entertain" a Rule 60(b) motion at some future date after remand does not require jurisdiction. Then how does one obtain relief pursuant to Rule 60(b) after notice of appeal is filed in the Ninth Circuit Court? That is a classic catch 22 scenario.

The Ninth Circuit Court's procedure for considering a Rule 60(b) motion after notice of appeal creates unnecessary paper shuffling by placing same issues twice before the District Court. Why not let the District Court decide a Rule 60(b) motion, then worry about remand if necessary as is the procedure employed by other Circuit Courts?

In *Stein v. Wood*, 127 F.3d 1187 (9th Cir. 1997), the Ninth Circuit Court based upon guidance from this Court, *Stone v. I.N.S.*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) updated the procedure when it enumerated its *exceptions* to its general rule that filing notice of appeal divests a district court of jurisdiction. One of such exceptions under which the District Court could retain jurisdiction is to rule on a Rule 60(b) motion. However, the Ninth Circuit Court in the instant case has refused to follow the precedent and the authority of this Court.

The Respondent misses the *exceptions* listed and instead erroneously argues that Petitioner's case does not fit into the circumstances of the *Stein*.

Similarly, the Respondent erroneously tries to negate the opinion of this Court in *Stone* that the pendency of appeal does not affect the District Court's power to grant

Rule 60(b) relief by quoting *Wright & Miller.* The Respondent got it backwards. It's the Supreme Court of the United States which has the final authority to interpret and enforce laws and not *Wright & Miller.* In *Stone,* this Court provided that the closest analogy to I.N.S.' discretionary petition for agency reconsideration is the motion for relief from judgment under F.R.C.P. Rule 60(b) (*id.,* at 479).

RESPONDENT WAIVED RIGHT TO CONTEST A FRIVOLOUS UNPRESERVED ISSUE

The Respondent catching at the last straw frivolously takes issue for the first time that the Petitioner did not file a Notice of Appeal from the District Court's Order denying, "Motion to Grant Hearing on a Rule 60(b) motion." The Respondent waived objection when it did not raise the issue before the Court of Appeals.

Certiorari will be dismissed as improvidently granted where the record in the case fails to present for review the question for which certiorari was granted or if the issue for which the certiorari was granted was not presented to, or ruled on by the court below; or necessary findings were absent. *Mishkin v. New York,* 383 U.S. 502, 16 L. Ed. 2d 56; 86 S. Ct. 958, *reh. den.,* 384 U.S. 934, 16 L. Ed. 2d 535, 86 S. Ct. 1440 (1966). Or no objection was taken below so as to preserve the question for review; *Tyrrell v. District of Columbia,* 243 U.S. 1, 61 L. Ed. 557, 37 S. Ct. 361 (1917).

Respondent forgets that Motion for remand was concurrently in the Ninth Circuit Court. Petitioner made Motion for Reconsideration and Clarification. The Motion Panel deferred the matter to the Appellate Panel for consolidation of the issue involving Rule 60(b) with rest of the issues on appeal. (Appendix D-2).

In *Stone,* this Court provided, "The denial of the motion is appealable as a separate final order, and if the

original appeal is still pending it would seem that the court of appeals can *consolidate* proceedings." *Stone v. I.N.S.*, 131 L. Ed. 2d 465 at 479).

PETITIONER PRESENTS ADDITIONAL QUESTION ON JURISDICTIONAL GROUNDS FOR GRANT OF WRIT OF CERTIORARI

Petitioner in order to be not repetitious at the expense of judicial economy, did not frame a second question as follows:

> "Whether District Court had jurisdiction to alter the stipulated terms of the oral agreement by awarding attorneys fees by attaching the terms of fundamental contract principal."
>
> "Court has no power to condition stipulation under Rule 41(a)(1)(ii) *Wright & Miller, 2363, Page 271, 1996.*

In *Wolfe*, the district court changed the stipulation for voluntary dismissal from without prejudice to with prejudice. The court of appeals granted mandamus and provided that the district court lacked authority to alter stipulation and cause dismissal to be with prejudice, Fed. Rules of Civ. Procedure 41(a)(1)(ii) *In Re: Wolf*, 842 F.2d 464 (D.C. Cir. 1988).

In this case the declarations by the Petitioner and the Respondent's attorney Joey Moore showed that the no award of attorneys fees in case of breach of oral agreement had been agreed upon.

Petitioner requests the court to grant certiorari on this separate jurisdictional question, which was appealed and raised before and ruled by the Ninth Circuit Court. "Jurisdictional questions will be considered by the court although not raised in the petition for certiorari." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips*

Corp., 126 L. Ed. 2d 396, 62 USLW 4007, 1993-2 CCH Trade Cases # 70428, 7 FLW Fed. S. 661 (1993, U.S.).

CONCLUSION

There is serious conflict between the procedures employed by the Ninth Circuit Court and the rest of the Circuit Courts for consideration of Rule 60(b) motion after Notice of Appeal is filed.

Petitioner closely followed the procedure employed by the Ninth Circuit, yet the Petitioner was informed by both District Court and Court of Appeals that he was not entitled to even "ask" for a *Hearing* for Grant of Rule 60(b) motion for lack of jurisdiction of the District Court.

The Petitioner in this petition has presented evidence for Relief for "Excusable Neglect due to attorney's negligence and for lack of jurisdiction of the District Court to alter terms of oral contract and award attorney's fees by attaching terms of fundamental general contract principle

WHEREFORE, the Petitioner prays that Court after considering the documents submitted, pursuant to Rule 16.1, enter an order for summary disposition on merits and vacate the decision of the Court of Appeals, reverse the District Court's order for award of attorney's fees and remand for consideration of Rule 60(b) motion.

Respectfully submitted,

Date: June 11, 1999

JEHAN Z. MIR, MD
Petitioner/Pro-se

APPENDIX H

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO GRANT HEARING ON RULE 60 MOTION DATED MAY 5, 1997

JEHAN ZEB MIR, M.D.
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Lynwood, California 90262
(310) 637-2010

Pro se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JEHAN ZEB MIR, M.D. Plaintiff/Counter defendant vs. FHP, INC., a corporation, RAMIRO RUEDAS, an individual, DOES 1 through 50, inclusive Defendant/ Cross-claimant AND RELATED COUNTER-CLAIM	CASE NO. CV 95-7523 JGD (SHx) [Judge John G. Davis] Court of Appeal Case No. 97-55424 PLAINTIFF'S REPLY TO DEFENDANTS OPPOSITION TO MOTION TO GRANT HEARING ON RULE 60 MOTION Date: May 12, 1997 Time: 1:30 p.m. Courtroom: 890

I.

REPLY TO SUMMARY OF RESPONSE

(Filed May 5, 1997)

The opposition by F.H.P Inc. is ill-conceived and is designed to mislead the court to the nature and purpose

of this motion. The F.H.P. opposition is directed towards some imaginary motion made under Rule 60 when in fact no such motion under Rule 60 has been made by the plaintiff. As was pointed out in the plaintiff's motion, the procedures and policy of the Ninth Circuit Court of Appeals sanctionably prohibits filing of motion pursuant to Rule 60 Motion in the District Court after a Notice of Appeal is filed till such time the matter has been remanded to the District Court and the jurisdiction has been restored. The defendant F.H.P. should be sanctioned for filing a frivolous pleading which is of no effect since district court does not have jurisdiction of the case and violating the procedures and policy of the Ninth Circuit Court of Appeals by filing an opposition to Rule 60 Motion with intent to harass and annoy plaintiff by asking sanctions against him. The plaintiffs therefor will not be drawn into a sanctionable conduct of discussing the merits of his case for Rule 60 Motion in part or whole since this court has no jurisdiction at this time to hear any arguments regarding Rule 60 Motion. This motion is just to "ask" the court if the court would "entertain" a motion to be made under Rule 60. Asking a mere question of the court does not require jurisdiction of the matter.

The F.H.P. opposition is frivolous since it has not quoted a single statue [sic], case law, federal rules of procedures or local court rules which would establish a policy that movant should be stop [sic] short of the clerks filing window and not allowed to file this motion to "ask" or any future motion to be made under Rule 60. F.H.P. contention that plaintiff requested relief only under Rule 60(b)(i) excusable neglect in incorrect. Plaintiff requested that he should be allowed to file a motion

under Rule 60. F.H.P. or Rule 60(b) which may include any or all subsection of Rule 60.(b)

Plaintiff had an on restricted right to file and be heard on a Rule 60 Motion if the movant had filed the motion within 10 days of the entry of the Amended Summary Judgment or before filing of the Notice of Appeal and would have a right to file and be heard under Rule 60(b) motion when the mandate from Court of Appeals is issued provided it happens within one year limit. F.H.P. has not shown why now F.H.P. would be prejudice [sic] for a delay in filing of this motion beyond 10 days or before filing the Notice of Appeal. Court has no discretion to deny the leave to file or "entertain" a motion under Rule 60(b) if the court does not have that discretion either before the Notice of Appeal is filed or after the Appeal process is completed. Rule 60 Motion is remedial in nature and must be liberally construed in granting the relief let alone filing a motion to "ask" the court if the court would "entertain" a motion under Rule 60. Defaults Summary Judgments are generally disfavored and once the plaintiff if given an opportunity to be heard on its genuine issues of materials fact it would become clear that F.H.P. was not entitled to any Summary Judgment. The practice employed by all other Circuit Courts within the United States is to guarantee a Rule 60 hearing after Notice of Appeals is filed.

II.

PLAINTIFF DID NOT FILE A RULE 60(b) MOTION

Once a leave of the District Courts is obtained to file a motion the next step is to file for a motion to the Ninth

Circuit Court of Appeals to remand the case to the District Court in order to return jurisdiction on this matter. Only then a motion for Rule 60 is filed or can be heard. Any violation of this procedure of policy is sanctionable and the F.H.P. has violated that policy by raising whole gamut of issues related to burden of proof of the plaintiff for seeking relief, the merits of Summary Judgment and terms and conditions to be imposed upon plaintiff pursuant to Rule 60(b) motion. F.H.P. should be sanctioned particularly when the plaintiff in his motion clearly discussed this sanctionable policy of the Ninth Circuit Court of Appeals. "The district court's rationale for finding the motion . . . frivolous was correct and not abuse of discretion. A competent reading of over rules and precedent would very quickly have made clear Wright that he did not follow the correct procedure in attempting to have the sanctions motion reconsider after he had filed his notice of appeal"). ***(Townsend v. Holman Consulting Corp.,*** 929 F.2d 1358, 1366-1367 (9th Cir. 1990) F.H.P. is opposing some "ghost" Rule 60 motion which simply does not exist. The District Court is without any jurisdiction of this matter at this time and F.H.P.'s opposition is of no effect. Plaintiff is not required to discuss any issues raised by F.H.P. concerning the justification for Rule 60(b) Motion at this time. In fact, in *Townsend,* (*supra,* at page 1360; 1367) the court stated that all was required was to notify the district court that a remand is being requested.

III.

F.H.P. HAS FAILED TO PROVIDE ANY RATIONALE BASIS FOR COURT TO DENY A HEARING ON A RULE 60 MOTION.

F.H.P. has not quoted any statues [sic], federal rules of civil procedures, local District Court rules, case law which would provided any basis for the District Court to deny an request for filing a motion pursuant to Rule 60. This motion "asking" the District Court whether it wishes to an "entertain" the motion under Rule 60 is not preconditioned upon any reasons, justification or explanations. A Rule 60 Motion can be filed an heard without any restriction within the first 10 days of the entry of the Amended Summary Judgment or before a Notice of Appeal is filed or after the appeal process is completed provided such a motion is made within one year of the entry of the Amended Summary Judgment. Therefore plaintiff has not missed some imaginary deadline for filing of the Rule 60 Motion that it must now demonstrate "excusable neglect", mistake or inadvertence. Purpose of filing for this motion is only a procedural nicety to form a basis for the remand of the cases from the Ninth Circuit of Appeals to the District Court so motion under Rule 60(b) can be filed and heard. The Rule 60(b) is remedial in nature an must be liberally construed and such relief should be freely granted to permit the desirable legal objectives that the cases made be decided on there [sic] merits let alone granting leave to file a motion under Rule 60(b). "This rule authorizing court to relieve party or his legal representative from final judgment for mistake, inadvertence, surprise, or excusable neglect is a remedial

provision intended to prevent injustice by allowing parties their day in court even though some technical error has occurred that would otherwise be ground for default or dismissal." ***(Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n for Parish of East Baton Rouge,*** C.A. 5th, 1975, 507 F.2d 573. "It has been said that 'courts will not permit technicalities to prevent them from remedying injustice.' ***(Trueblood v. Grayson Shops of Tennessee, Inc.*** D.C. Va. 1963, 32 F.R.D. 190, 197. "Any doubt whether in the court's discretion a motion to open a judgment should be granted is resolved in the movant's favor. ***(U.S. v. Small,*** D.C.N.Y. 1959, 24 F.R.D. 429. "Rule 60 is designed to permit the desirable legal objective that cases may be decided on their merits, and it must be given a liberal construction, and only after a careful study of all the relevant considerations should courts refuse to open default judgments." ***(Patapoff v. Vollstedt's Inc.*** C.A. 9th 1959, 267 F.2d 863. "While a district judge had discretion to grant or deny a motion to vacate a default judgment, that discretion is limited by three important considerations: first, the fact that governing rule is remedial in nature and, therefore, must be liberally applied; second, by fact that default judgments are generally disfavored; and third, by fact that doubt should be resolved in favor of motion to set aside judgment so that cases may be decided on their merits when relief sought is timely and movant has a meritorious defense.

(Schwab v. Bullock's Inc. C.A. 9th, 1974, 508 F.2d 353.

The procedures employed in the other Circuit Courts grant on un-restricted right of the movant for relief under Rule 60 after a Notice of Appeal is filed.

1st Circuit "When an appeal is pending. . . . , parties may file a Rule 60(b) motion directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously.

(Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 (1st Cir. 1979)

2d Circuit "For proposition that "the district court can entertain and *deny* the rule 60(b) motion; however, 'if [the district court] decides in favor of it, then and then only is the necessary remand by the court of appeals to be sought' ").

(Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) (citing *Ryan v. United States Line Co.,* 303 F.2d 430, 434 (2d Cir. 1962)

3d Circuit "The Filing of a notice of appeal does not divest a district court of jurisdiction to *entertain* Rule 60(b) motion"

(United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974, 988 (3d Cir. 1992)

5th Circuit "Our court recognizes . . . 'the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeal. . . . When the district court is included to grant the 60(b) motion, however, then it is necessary to obtain the leave of the court of appeals' ").

(Travelers Ins. Co. v. Liljeberg Enterprises, Inc, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994)

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(Brown – United States, 976 F.2d 1104, 1110-1111 (7th Cir. 1992)

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8th Circuit "During the pendency of an appeal . . . the district court has jurisdiction to consider the motion and if it finds the motion to be without merit to enter an order denying the motion, from which

> an appeal may be taken. If, on the other hand, the district court decides that the motion should be granted, counsel for the movan [sic] should request the court of appeal to remand."

(***Pioneer Ins. Co. v. Gelt,*** 558 F.2d 1303, 1311-1312 (8th Cir. 1977)

> ***10th Circuit*** "Although it lacked jurisdiction to *grant* the Rule 60(b)(2) motion due to the appeal . . . , the court was free to consider the motion and the court could then either denied on the merits or court could have notified us of its intention to grant the motion upon proper remand.

(***Aldrich Enterprises, Inc. v. United States,*** 938 F.2d 1134, (10th Cir. 1991)

> ***D.C. Circuit*** "When both a rule 60(b) motion and an appeal are pending simultaneously, . . . the District Court may consider the 60(b) motion and, if the District court indicates that it will grant relief, the appellant may move the appellate court for a remand."

(***Hoai v. Vo.,*** 935 F.2d 308, 312 (D.C. Cir. 1991)

It is clear that there is absolutely no restriction to file and be heard on a Rule 60(b) motion in the district court after the notice of appeal is filed provided the proper procedures for each Circuit Court are followed. F.H.P.'s opposition that the plaintiff should not be granted a

"leave" to file a Rule 60 motion is baseless and should be sanctioned. (infra)

IV

ATTORNEY NEGLIGENCE QUALIFIES AS "MISTAKE" OR AS EXCUSABLE NEGLECT UNDER RULE 60(b)(i)

Attorney's negligence does qualify for relief under Rule 60(b)(i). This is a good law where court can recognize instantaneously the negligence or malpractice of an attorney and grant relief to the client. This saves time, serves justice, the interest of judicial economy by preventing a malpractice litigation and does not unjustly reward a wrongful party. "When the party is blameless attorney's negligence qualifies as "mistake "or as an" "excusable neglect" under rule governing relief from judgment. Federal Rules of Civ. Procedure, Rule 60(b)(i). 28 U.S.C.A. ***Augusta Fiberglass Coating Inc. v. Fodas Contracting*** 843, F.2d 808 (4th Civ. 1988). However, the plaintiff intends to seek relief under Rule 60(b) (i) "excusable neglect" (ii) newly discovered evidence (iii) fraud, misrepresentation, circumvention, and other misconduct (iv) lack of subject matter jurisdiction;

One of the plaintiff's genuine issues of material fact is that it was F.H.P., who violated the terms and conditions of the oral contract. That's why the Settlement Agreement was never signed because it was not in accordance with the oral agreement.

Attorney Walker's malpractice if it occurred is not the issue. The real issue is that FHP is not entitled to a Summary Judgment in the first instance. All the FHP had

was a Default Summary Judgment. Plaintiff was never given an opportunity to present his genuine issues of material fact. "When defendants believed that the matter was being handled by their attorney after they delivered the papers to him, they were not guilty of gross neglect. Therefore, they also alleged a meritorious defense and no prejudice was suffered by plaintiff, the motion to set aside default entry was granted. ***SEC v. Vogel,*** D.C.N.Y. 1969, 49 F.R.D. 297.

Plaintiff had instructed attorney Walker on March 21, 1996 to settle the matter with FHP, since the litigation was expensive (decl. Mir, 4) "Agreeing with the district court's determination that the defendant's conduct was culpable, the court of appeals nevertheless reversed the denial of the relief from the entry of default, holding that the presence of a meritorious defense and absence of prejudice to the claimant required that deposition." ***Berthelsen v. Kane,*** 907 F.2d 617 (6th Cir. 1990) "Although the factor of the culpability of the defendant favored the plaintiff, the denial of a motion to vacate the entry of default was error where the defendant possessed a meritorious defense and the plaintiff would not be prejudiced by the relief" ***FDIC v. Francisco Inv. Corp.,*** 873 F.2d 474 (1st Cir. 1989) "Failure to consider the defendants arguments as to meritorious defense constituted an abuse of discretion. ***Anilina Fabrique de Colorants v. Aakash Chems.*** 856 F.2d 873 (7th Cir. 1988)

V

PLAINTIFF FILED THE MOTION PROMPTLY AND IN REASONABLE TIME, FHP HAS NOT BEEN PREJUDICED

The Summary Judgment was entered on February 19, 1997. Plaintiff became aware of Amended Summary Judgment on February 21, 1997. On March 18, 1997 Plaintiff was finally able to get hold of his attorney Walker and substituted himself. One [sic] the same day plaintiff filed his Notice of Appeal and the district court was divested of jurisdiction of the matter. On March 28, 1997, plaintiff filed Transcript Designation and Ordering Form. On March 31, 1997 plaintiff filed motion for stay of execution of money judgment and appeared for hearing on April 14, 1997. On April 18, 1997, plaintiff filed the instant motion to "ask" the court if it would "entertain" a Rule 60(b) motion. All this was accomplished within one month of substituting as pro se. The one year limit for Rule 60(b) motion does not expire till February 18, 1998, FHP has not been prejudiced nor FHP has claimed any prejudice in its opposition. FHP's claim that motion is not filed in reasonable time is baseless. FHP quotes three cases which do not support FHP's position. Plaintiff does not accept any one of them. In *Meadows v. Dominican Republic* (9th Cir. 1987), 817 F.2d 517, the court concluded on the timeliness of defendant's motion to vacate that it was timely filed because less than one year had elapsed from the entry of judgment, however the motion was set aside because defendant had no meritorious defense. In *Ashford v. Stewart* (9th Cic. [sic] 1981), the Plaintiff failed to file a notice of appeal within thirty days of the order denying leave to file his complaint in forma pauperis. The

court of appeal had no jurisdiction to consider the merits of the ruling under Fed. R. App.P. 4(a) "Because the time for appeal had passed, the interest in finality must be given great weight." In *Jones v. Phipps* (7th Cic. [sic] 1994) 39 F.3d, 158, 163), the defendant did not file notice of appeal within thirty days while she had access to two attorneys. Filing beyond the deadline the Notice of Appeal or motion under Rule 60(b) one year limit is not the issue in the present motion.

VI

FHP's OPPOSITION IS FRIVOLOUS AND ATTORNEY VANDERPOOL MUST BE SANCTIONED

Frivolous is defined as of little weight and importance. A pleading is "frivolous" when it is clearly insufficient on its face and does not controvert the material point of the opposite pleading. "A claim or defense is frivolous if a proponent can present no rational argument in support of its claim or defense ***Leibowitz v. Amiexo, Inc.*** (Colo App. 701 P.2d, 140, 142)

"Word "Frivolous" when used in connection with sanctions imposed under Rule 11 of Federal Rule of Civil Procedure denotes filing that is **both baseless and made without reasonable and competent inquiry**. Fed. Rule Civ. Proc.Rule 11, 28 U.S.C.A. ***Townsend v. Holman*** (929 F.2d 1358 (9th Cir. 1990)

FHP's opposition is directed towards some phantom Rule 60(b) motion which the plaintiff has yet to file. Nine (9) of the eleven (11) pages of the opposition are nothing but a

repetition in verbatim of its points and authorities previously filed in support of its motion for Summary Judgment (Judicial Notice request, docu. #2, #4) as an opposition to instant motion that Mir has not satisfied the burden under Rule (60) and asked for terms and conditions to be imposed upon Mir. FHP is clearly shooting in the dark when the court does not have jurisdiction to adjudicate such issues or Mir has been given an opportunity to present his genuine issues of material fact.

Attorney Douglas Vanderpool did not make reasonable and competent inquiry to quote any authority. He didn't have to go too far to find the answers. All he had to do was to review the plaintiff's motion and he would have learnt [sic] the procedure of the Ninth Circuit Court of Appeals and sanctions imposed against an attorney in **Townsend** for filing a motion under Rule 60(b) after Notice of Appeals was filed. It appears that attorney Vanderpool did not even care to read the plaintiff's motion yet he made a declaration that he has spent 10 hours in reviewing this motion and preparing a response. In Townsend (Supra) the court stated "Determination of improper purpose in connection with signing of paper under Rule 11 must be supported by determination of frivolousness when complaint is at issue. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

The improper purpose was to harass and annoy and intimidate the plaintiff in asking actions against him requiring the plaintiff to make a concerted reply at great expense of time and effort. Plaintiff had to spend 10 hours in reviewing his opposition and preparing this reply. The attorney Vanderpool should be sanctioned in an amount of $1500.00 for filing a frivolous pleading

which was of no effect and he presented no rational basis, case law, statute, Federal Rules of Civil Procedure in support of its opposition ***(Townend [sic] v. Holman,*** Cite as 929 F.2d 1358 (9th Cir. 1990)

Wherefore, the plaintiff requests the court (1) to grant leave to file motion pursuant to Rule 60(b) (2) to impose sanctions against attorney Vanderpool for $1500.00

DATED: May 5, 1997

SIGNED /s/ Jehan Zeb Mir, MD
JEHAN ZEB MIR, MD,
Pro-se

APPENDIX I

DECLARATION OF JEHAN ZEB MIR, IN SUPPORT OF MOTION TO GRANT HEARING ON RULE 60 MOTION DATED APRIL 18, 1996

JEHAN ZEB MIR, M.D.
3633 Martin Luther King Jr. Blvd.
Suite #1
Lynwood, California 90262
(310) 637-2010

Pro per

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JEHAN ZEB MIR, M.D. Plaintiff, vs. FHP, INC., a corporation, RAMIRO RUEDAS, an individual, DOES 1 through 50, inclusive Defendants.	CASE NO. CV 95-7523 JGD (SHx) (Los Angeles Superior Court Case No. BC 127139 [Judge John G. Davies] NINTH CIRCUIT COURT APPEAL CASE NO: 97-55424 DECLARATION OF JEHAN ZEB MIR, M.D. IN SUPPORT OF MOTION TO GRANT HEARING ON RULE 60 MOTION (Filed Apr. 18, 1997)
FHP, INC., a California corporation. Counter-complainant, vs. JEHAN ZEB MIR, M.D.,	Date: May 12, 1997 Time: 1:30 p.m. Courtroom: 890

I, JEHAN ZEB MIR, M.D. declare as follows:

1. I am plaintiff pro se in this matter of Mir v. FHP CV-95-7523 JGD (SHx).

2. I am aware of the events from my personal knowledge and I have reviewed the file and familiar with the matter. I am competent to testify if called to testify.

3. On November 3, 1996, I discussed the matter of Mir v. FHP with my attorney Robert Walker. We both reached a conclusion that FHP in view of its arrogance and abundance of financial resources and threats made by Tom Knego Vice President FHP that he would rather give all the money to Law Offices of Spray, Gould & Bowers to litigate rather than give any money to me, continuation of expensive litigation in view of small amount of bill was not justified. That Mr. Walker should do whatever he could to settle the matter.

4. On March 21, 1996, I received a bill of $7,778.02 from my attorney Robert Walker to legal services rendered in the instant matter CV-95-7523 JGD (SHx). I at once called attorney Robert Walker and informed him that litigation was very expensive, that litigation must stop without further waste of time or money, that he should settle the case. Mr. Walker informed me that he would do just that.

5. Attorney Robert Walker never informed me about FHP's Motion for Summary Judgment or Amended Summary Judgment. He never sent me any notices or document relating to such motions or hearings.

6. I, on February 21, 1997, received the court order for Amended Summary Judgment awarding FHP attorneys fees in an amount of $19,491.25.

7. I immediately called his office to find out what had happened. Failing to find him there, I wrote a letter

to him. I thereafter made numerous telephone calls and left messages. I was finally able to contact my attorney Robert Walker on March 18, 1997, when he signed substitution papers. He informed me that he was caught in a marathon depositions and could not call back in time. However Mr. Walker informed me that he had reached a settlement of $6000.00 with FHP attorney prior to motion for Summary Judgment was taken by FHP. That the FHP was pushing Summary Judgment under the pretext of a Final Judgment so that I would not be able to file another law suit against FHP in this matter.

I declare under the penalty of perjury that foregoing is true and correct.

Date: 04/18/97

Signed /s/ Jehan Zeb Mir, M.D
JAHAN ZEB MIR, M.D.
Plaintiff/
counter defendant Pro se